

Members present: Vern Gardner, Craig Wilson, Brian Boyle, Niles Pinkham, Brett Costa

Members absent: None

Staff: Heather Ross, Assistant Code Enforcement Officer

The meeting was called to order at 7:04 p.m.
Pledge to the Flag

ITEM 1 – Mary Thron and Rayond Arris requesting a variance to the terms of Title 16 Section 3.2.6.D and Title 16 Section 3.2.17.D in order to change a property line between properties located at 17 Tower Road, Map 58 Lot 42, and 73 Tower Road, Map 58 Lot 42A, zoned Residential-Rural, Conservation, Shoreland and Resource Protection.

Mr. Wilson noted that according to Title 16.1.5.2.F.3 the Board of Appeals has the authority to hear this item.

Ms. Thron explained the home they wished to move into needs to have the septic system replaced for a three-bedroom use, requiring more area in the yard. They do not want to burden the future owner at 73 Tower Road with an easement, and are requesting a property line movement to provide more room for the septic system. The 73 Tower Road lot is more conforming than other lots on the road and would continue to be so, with more than 200 feet of road frontage.

There was no public comment for or against the request. The CEO provided:

1. The applicants are requesting a variance to the terms of Title 16.3.2.6.D and Title 16.3.2.17.D. in order to change property lines between properties located at 17 Tower Road, Map 58 Lot 42, and 73 Tower Road, Map 58 Lot 42A, zoned Residential-Rural, Conservation, Shoreland and Resource Protection.
2. These are two non-conforming lots located within the Residential-Rural Conservation, Shoreland and Resource Protection zones.
3. The residential-Rural conservation zone requires a minimum 80,000 sf land area per dwelling unit.
4. The lot located at 71 Tower Road is currently a nonconforming lot at 17, 424 sf in land area.
5. The lot located at 73 Tower Road is currently a nonconforming lot at 33, 976 sf in land area.
6. The proposal is to change the lot line between these two nonconforming lots. The result would make one lot more non-conforming, and the other lot less non-conforming.
7. Title 16.3.2.17.D.1.c, Shoreland Overlay Zone Standards, requires a minimum 250 feet of minimum shore frontage per lot and dwelling unit. It appears the proposed line change would result in the property located at 71 Tower Road, becoming more non-conforming as to the shore frontage for the lot.
8. Title 16.7.2.1, Conformity Required, states:
No building structure or land may hereafter be used or occupied, and no building or structure or part thereof may hereafter be erected, constructed, expanded, moved or altered and no new lot may be created except in conformity with all of the regulation herein specified for the zone where it is located, unless such structure or use exists as a legally nonconforming use, or a variance is granted.
9. Title 16.6.4.2, Variance, states:
A. A variance may be granted only by the Board of Appeals under the following conditions:

1. *For a reduction in dimensional requirements related to height, area and size of structure, or size of yards and open spaces;*
2. *The use is not prohibited by the Code; and*
3. *Only if the strict application of the terms of the Code would result in 'undue hardship'. The term undue hardship means the applicant must demonstrate all of the following:*
 - a. *The land in question cannot yield a reasonable return unless a variance is granted.*
 - b. *The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood.*
 - c. *The granting of a variance will not alter the essential character of the locality.*
 - d. *The hardship is not the result of action taken by the applicant or prior owner.*

Ms. Thron stated when initially purchased, there were two lots comprising 73 Tower Road and some of the lot was added to 77 Tower Road in 1983, though both lots remained nonconforming. Mr. Gardner asked about 16.7.3.1.C, *Nonconforming uses may continue, may be changed to an equal or more appropriate nonconforming use, or be changed to a conforming use.* Ms. Thron stated the town has incorrect lot sizes. A recent survey shows 71 Tower is 15,150 square feet and 73 Tower is 35,415 square feet [referenced hand written figures on survey in application packet].

Mr. Pinkham stated he felt it was something that should be done, but how to accomplish it? He is not in favor of easements for septic systems. Mr. Wilson stated he did not think it was possible to grant the variance based on the four hardship tests required. Mr. Gardner asked if there was another way to address this issue. The CEO suggested if it was no more non-conforming, an equal land swap, the Board could address it that way, but the shorefront minimum requirements needed to be met. Discussion followed regarding how the lot dimensions would change and how the Board could then review under a miscellaneous variation appeal. Mr. Gardner explained to the applicant granting a variance for their request could not happen, however, if the applicant changed their appeal, the Board could consider their request. Mr. Wilson provided a sketch illustrating how the property would have to be divided to be considered. The CEO stated the sketch by Mr. Wilson could be approved under a miscellaneous appeal. Discussion followed with the applicant regarding view easements over the portion of 73 Tower Road. Mr. Wilson read, *The Maine Supreme Court has stated in numerous cases that a Board of Appeals must grant zoning variances sparingly, they are the exception rather than the rule. The test for undue hardship outlined above is a very strict one and very difficult to meet, no matter how harmless the variance request may seem. The Board must remember its decision is governed by the legal requirements of undue hardship in 30 MRSA 4352 for zoning variations...*

Mr. Gardner stated the applicant is getting what they need, though the property line is not a straight one, but a ragged one. Mr. Wilson stated the shore frontage at 71 Tower Road cannot be diminished. Discussion followed regarding easements, restrictions and other lot line delineations to accomplish the desire of the applicant, and further explanation as to why this application could not meet variance requirements.

The applicants agreed to have the application reviewed as a miscellaneous variation. Mr. Wilson suggested a motion stating that land can be swapped as long as neither lot becomes more non-conforming, and the applicant can choose whatever configuration they wish. Mr. Pinkham concurred and added the applicant could also choose to take the easement route. Mr. Boyle stated frontages must remain the same.

Mr. Boyle moved that under Title 16.6.6.1 Conditions and Title 16.6.6.2 Factors for Consideration, and finding the application for a miscellaneous variation conforming to those sections, the Board of Appeals grants to Mary Thron and Raymond Arris a miscellaneous variation for lots located at 73 and 71 Tower Road, Map 58 Lot 42 and Lot 42A, in the Residential-Rural, Conservation, Shoreland and Resource Protection zones, and further requiring that land may be swapped between the two lots as desired so long as neither lot is made more non-conforming than they presently are, and all dimensional requirements including but not limited to shore and road frontage and setbacks be retained.

Mr. Costa seconded

Motion carries unanimously

Findings of Fact:

1. Mary Thron and Raymond Arris (Applicants) came before the Board with a variance to three sections of Title 16. After discussion, applicants decided to change appeal to a miscellaneous variation in order to have a septic system for 71 Tower Road not be on property of 73 Tower Road.
2. Applicants' household is at 73 Tower Road; applicants wish to scale down and purchased 71 Tower Road; no changes to this property since the 1960s; functioning septic system needs to be replaced, requiring land area not available at 71 Tower Road; applicants felt a septic easement would not be an enhancement to 73 Tower Road. 73 Tower Road has 200 feet of road frontage.
3. Zone requirements are 80,000 sf per dwelling unit; 71 Tower Road has 15,170 sf; 73 Tower Road has 35,415 sf. Both are nonconforming lots in size and in shore frontage, where 250 feet are required.
4. There was no public comment.

Mr. Pinkham moved to accept the Findings as read

Mr. Costa seconded

Motion carries unanimously

Conclusion

Board has authority under Title 16.7.3.1.A. *Except as otherwise provided in this Article, a nonconforming condition must not be permitted to become more nonconforming.* The Board finds the proposal to swap equal square footage from one lot to another makes neither more nonconforming and the Board granted the appeal.

Mr. Boyle moved to accept the Conclusion as read

Mr. Costa seconded

Motion carries unanimously

Minutes - December 12, 2012

Mr. Wilson moved to accept as amended

Mr. Costa seconded

Motion carries unanimously

Mr. Costa moved to adjourn

Mr. Pinkham seconded

Motion carries unanimously

The Kittery BOA meeting of February 26, 2013 adjourned at 8:00 p.m.

Submitted by Jan Fisk, March 4, 2013